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In the Supreme Court of the United States

OCTOBER TERM, 1959

NO. 342

HOWARD L. NOSTRAND and MAX SAVELLE,
Appellants,
vs.
THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, *Respondents.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

JOHN J. O'CONNELL,
Attorney General.

HERBERT H. FULLER,
Acting Chief Assistant Attorney General.

Office and Postoffice Address: Temple of Justice, Olympia, Wn

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

Pursuant to the provisions of Supreme Court Rule 16, paragraph 1 (a) and (b), 28 U.S.C.A., 1959 Supp., p. 10, appellees respectfully move the above entitled court to dismiss this appeal on the following grounds:

1. The appeal is not taken in conformity to Su-

preme Court rules, particularly rules 15, 1 (d) and 40, 1 (e), 28 U.S.C.A., 1959 Supp., pp. 9 and 25, respectively; and

2. Certain of the questions sought to be reviewed have not been properly raised or expressly passed on by the Supreme Court of Washington; and

3. It does not present any substantial federal question; and

4. The judgment rests on an adequate non-federal basis.

For convenience, the foregoing grounds urged by appellees as affording grounds for dismissal will be discussed in the order presented.

1. APPEAL NOT IN CONFORMITY TO SUPREME COURT RULES

Supreme Court Rule 15 provides in part that:

1. The jurisdictional statement required by paragraph 2 of Rule 15 shall contain in the order here indicated:

"* * *

"(d) A concise statement of the case containing the facts material to the consideration of the questions presented. If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific por-

tions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

Supreme Court Rule 40, relating to briefs, requires, in part:

"1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated—

"* * *

"(e) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the printed record, e. g., (R. 12)."

Reference to appellants' statement as to jurisdiction discloses that on pages 4 and 5 thereof, under the title "Questions Presented," appellants list seven questions. These questions are each treated by appellants in their brief, pages 8 through 15, wherein they set forth their contentions and the precedential authority believed to be supporting or controlling. But, nowhere do appellants point out at what stage of the proceedings or in what method or manner, if any, each or any of these questions was raised in the Supreme Court of Washington. Nor do appellants point out that the questions which they pose were ever passed upon by that court. Of course, the jurisdictional statement contains no reference to the

places in the record where the questions posed were either raised in or ruled on by the Supreme Court of Washington.

At page 2 of appellants' jurisdictional statement appellants state, however, that they commenced this action "for the purpose of obtaining a declaratory judgment adjudicating Chapter 377, Laws of Washington of 1955, * * * to be violative of several provisions of the Constitution of the United States. * * * " And at page 7 of their brief supporting their assertion of jurisdiction it is said:

> "The federal questions sought to be reviewed here were raised in the Complaint (Tr. 5) and the federal and state constitutional issues were the only matters in controversy at all stages of the proceeding in the trial court and the State Supreme Court. * * * "

Examination of the complaint reveals the following pertinent allegations:

> "VII. The terms, provisions, and requirements of the Act and the oath are in violation of plaintiffs' rights, privileges and immunities under the Constitution of the United States in the following particulars:
>
> "1. They violate the rights guaranteed under the First Amendment as made applicable to the States by the Fourteenth Amendment;
>
> "2. They violate the rights guaranteed under the Fifth Amendment as made applicable to the States by the Fourteenth Amendment;
>
> "3. They deprive the plaintiffs of their rights without due process of law and deny them

the equal protection of the laws as guaranteed by the Fourteenth Amendment; and

"4. They constitute a Bill of Attainder contrary to Article 1, Section 10."

Appellees submit that even if the foregoing brief, vague references to the manner in which the federal questions presently posed by appellants were raised, is sufficient compliance with Supreme Court Rule 15, still their jurisdictional statement does not substantially comply with that rule, inasmuch as it does not show that such questions were ever passed upon by the Supreme Court of Washington.

It is therefore submitted that appellants' jurisdictional statement does nothing more than invite this court to search the entire record to determine whether the questions presented were ever passed upon by the Supreme Court of Washington. Accordingly, appeal should be dismissed under Supreme Court Rule 16, 1(a) which provides:

"The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules."

2. MOST QUESTIONS PRESENTED WERE NEITHER RAISED IN, CONSIDERED OR PASSED UPON BY THE SUPREME COURT OF WASHINGTON

Because of appellants' failure to comply with Supreme Court Rules 15 and 40 as stated above, appellees have searched the entire record in this case in order to determine whether, and, if so, when and in what method or manner the questions presented

by appellants in their jurisdictional brief (pp. 4 and 5) were ever raised or passed on by the Supreme Court of Washington. This search has failed to reveal that questions numbered one, two, four and five were ever raised in, or passed upon by, that court. In reaching this conclusion appellees have examined the complaint (R. 3-8), appellants' brief (entitled "Respondents Brief" in the court below), the unanimous, en banc, opinion rendered by the Supreme Court of Washington (Appendix A of appellants' jurisdictional brief) and the Certificate of Constitutional issue entered in the Supreme Court of Washington, May 28, 1959, by the Chief Justice thereof (R. 80). If appellees have been remiss in failing to identify the state of the proceedings below wherein any of these questions was raised or passed upon because the language and import of such questions does not correspond to the record, appellees respectfully invite appellants to point out, for the assistance of this court, wherein appellee's contentions in this regard are erroneous.

Because of the manner in which the sixth question presented by appellants is framed, appellees are unable to determine whether it was ever presented to or passed upon by the Supreme Court of Washington.

Appellees recognize and concede that the third and seventh questions posed by appellants were raised by brief in the Supreme Court of Washington and passed upon by that court in rendering its opinion.

Appellees therefore assert that, in any event, appellants' questions numbered 1, 2, 4, 5 and possibly 6, should not be considered by this court in determining jurisdiction. This, because this court is without jurisdiction to pass upon the questions not brought to the attention of the Supreme Court of Washington nor decided by it. *Harding v. Illinois*, 196 U. S. 78, 49 L. ed. 394, 25 S. Ct. 176; *Cox v. Texas*, 202 U. S. 446, 50 L. ed. 1099, 26 S. Ct. 671. Accordingly, and particularly as to questions 1, 2, 4, 5 and 6, this appeal should be dismissed. *France v. Missouri*, 154 U. S. 667, 26 L. ed. 86.

3. NO SUBSTANTIAL FEDERAL QUESTION PRESENTED

Of the two questions posed by appellants which were clearly presented to and decided by the Supreme Court of Washington, appellees submit that neither presents a substantial federal question. The first of these, question 3, reads:

> "3. Does such oath violate Section 10, Article I, of the Constitution of the United States in that it constitutes a Bill or Attainder?"

This question was disposed of by the highest court of Washington in the following language:

> "Section twelve of the 1951 act, as amended by laws of 1955, chapter 377, § 1, requires only that every present or prospective public employee state, under oath, whether he or she is 'a member of the Communist party or other subversive organization' at the time the oath is taken. No punishment for past conduct or political activity is involved. Only one qualification precedent to public employment is imposed. In short, this section is clearly neither *ex post*

facto nor in the nature of a bill of attainder. *Huntamer v. Coe, supra,* [40 Wn. (2d) 767, 246 P. (2d) 489 (1952)]; *Garner v. Board of Public Works of Los Angeles,* 341 U.S. 716, 95 L. Ed. 1317, 71 S. Ct. 909 (1951); *American Communications Ass'n. v. Douds,* 339 U.S. 382, 413, 94 L. Ed. 925, 70 S. Ct. 674 (1949); *Pickus v. Board of Education of Chicago,* 9 Ill. (2d) 599, 138 N. E. (2d) 532 (1956)."

(See: Appendix A of appellants' brief, pp. 33, 34.)

That Article 1, § 9 of the Federal Constitution applies only to penal legislation is settled beyond peradventure of doubt. *Harisiades v. Shaughnessy,* 342 U.S., 580, 96 L. ed. 586, 72 S. Ct. 512; *Galvan v. Press,* 347 U.S. 522, 98 L. ed. 911, 74 S. Ct. 737. See also: separate opinion of Chief Justice Warren and Associate Justices Black, Douglas and Whittaker in *Trop v. Dulles,* 356 U.S. 86, 2 L. ed. (2d) 630, 78 S. Ct. 590. Appellees submit that the third question posed by appellants is not substantial.

The seventh question posed by appellants was also raised in and disposed of by the Supreme Court of Washington. That question reads as follows:

> "Does such oath requirement violate the 1st and 14th Amendments to the Constitution of the United States in that it abridges freedom of speech, freedom of association and assembly?"

The question was exhaustively explored and authoritatively resolved conversely to appellants' arguments by the highest court of Washington in its opinion. (See Appendix A, pp. 34 through 39 of

appellants' brief.) Other state courts had previously disposed of this argument likewise: *Pickus v. Board of Education of Chicago*, 9 Ill. (2d) 599, 138 N.E. (2d) 532 (1956); *Albert Appeal*, 372 Pa. 13, 92 A. (2d) 663 (1952). But the federal decision which appears to appellees as controlling on this issue is *Adler v. Board of Education of the City of New York*, 342 U.S. 485, 492, 96 L. ed. 517, 524, 27 A. L. R. (2d) 472, 476 (1952). It is submitted that the latter decision is dispositive of appellants' argument on the seventh question posed and that that question is not substantial.

4. THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

In 1955, the legislature of the State of Washington in the exercise of its sovereign power, amended its existing subversive activities act of 1951 (appellants' brief, pp. 61-65) to require that every public employee or applicant for public employment state under oath whether, at the time of taking the oath, he was a member of the Communist Party or other subversive organization. The Communist Party was by § 4, chapter 377, Laws of 1955 declared by the state legislature to be a subversive organization.

Obviously, § § 3 and 4 of the amendatory act (See appellants' brief, Appendix C, p. 66) were both designed to clarify the organizations deemed to be subversive. (Section 3 of the act was held unconstitutional by the Supreme Court of Washington.) This was in order to prevent the claims of public em-

ployees or prospective public employees that the Communist Party was not a subversive organization within the meaning of the definition contained in § 1 (2) of the 1951 act.

Section 11 of the 1951 act declared that subversive persons were ineligible for public employment. Since the Communist Party has been (by § 4, chapter 377, Laws of 1955) declared to be a "subversive organization," any person who "with knowledge that the organization is an organization * * * [subversive organization or foreign subversive organization, as defined elsewhere] becomes or remains a member" (§ 1 (5), chapter 254, Laws of 1951; as amended by § 1, chapter 142, Laws of 1953; appellants' brief, Appendix C, p. 65) is not eligible for public employment. Thus, present members of the Communist Party are excluded from positions of trust and confidence in local government. The oath, however, is not required with respect to public employment in non-sensitive occupation. (See § 2, chapter 377, Laws of 1955, appellants' brief, Appendix C, p. 66).

Hence, the question resolves itself into two parts:

a. May the state exclude present members of the Communist Party from sensitive areas of public employment?

b. Must a state continue to employ one who refuses to answer that he is not a member of the Communist Party?

The Supreme Court of Washington decided both of the questions in the affirmative.

In addition, and with respect to appellants' contention that the element of "scienter" of the subversive character of an organization is not present in the oath or chapter 377, Laws of 1955. See p. 43 of appellants' brief wherein the language of the Supreme Court of Washington is quoted in part as follows:

> " * * * As we interpret the form of oath, we find that this element is implied in every clause thereof and of the pertinent statutory provisions. See *Garner v. Board of Public Works of Los Angeles*, [341 U. S. 716, 71 S. Ct. 909, 95 L. ed. 1317 (1951)], on which respondents rely, has no application."

Of course, this interpretation becomes a part of the statute itself for the purpose of determining its validity in the United States Supreme Court. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522, 3 L. ed. (2d) 480, 79 S. Ct. 437 (1959).

It seems apparent that there is, under the statutes here attacked, a "protection of the individual against arbitrary action" unlike the procedure involved in *Slochower v. Board of Education of the City of New York*, 350 U. S. 551, 100 L. ed. 692, 76 S. Ct. 637 (1955).

CONCLUSION

It is submitted that the statutes here involved, resting as they do on the police power inherent in the sovereign State of Washington are neither arbitrary, capricious or unreasonable. The decision of the Supreme Court of Washington rests upon valid and substantial non-federal grounds and for that reason, if for none of the other three reasons cited above, this appeal should be dismissed.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General.

HERBERT H. FULLER,
Acting Chief Assistant
Attorney General.